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June 28, 2004

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Ckt. No. 04-36

Dear Ms. Dortch:

Enclosed for filing in the above docket is the original and four copies of "Reply Comments of Ad Hoc Telecom Manufacturer Coalition."

Sincerely,

Rodney L. Joyce

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	WC Docket No. 04-36
IP-Enabled Services	)	

REPLY COMMENTS OF AD HOC TELECOM MANUFACTURER COALITON

Each of our companies is an active participant in the telecommunications manufacturing industry, and each of us considers his company to be highly entrepreneurial. For example, most of our companies are fewer than five years old, and while we have a combined total of about 11,800 employees most of our companies individually have fewer than 250 employees, and all of us compete against companies many times our size. Perhaps most revealing of our entrepreneurial spirit, however, is the fact that each of us believes strongly despite our youth and relatively small size that the best way to speed the introduction and expansion of new telecommunications and information services and capabilities is to minimize government regulation on all companies providing these services.

Because we believe that minimizing regulation is the best way for the government to help speed expansion of communications service, we submit this Reply to make two narrow but important points on regulatory questions raised in this proceeding: (1) the FCC should broadly forbear from applying Federal common carrier regulation to any IP-enabled service, including any IP-enabled service that meets the definition of an interstate "telecommunications service" as defined in the Communications Act; and (2) the FCC should preempt state telecom regulatory commissions ("PUCs") from regulating any IP-

enabled service, including any IP-enabled service that meets the definition of intrastate telecommunications service.

DISCUSSION

I. The FCC Should Forbear from Applying Federal Common Carrier Regulation to Any IP-Enabled Service Provided by Any Party

Although the FCC could conclude that no IP-enabled service is subject to common carrier regulation since Title II of the Communications Act authorizes common carrier regulation only of a "telecommunications service" and no IP-enabled service meets the definition of "telecommunications service,"[1] Section 10 of the Act[2] authorizes the Commission to forbear from applying common carrier regulation even to telecommunications services when each of three conditions exists. Several parties provide evidence in their opening comments that each of these three conditions exists with respect to IP-enabled services.[3] Opening comments show, for example, that forbearance complies with the condition that it be "consistent with the public interest" because forbearance will promote competitive market conditions in the IP-enabled services market.[4]

However, forbearing from the imposition of common carrier regulation on IP-enabled services is "consistent with the public interest" not only because it will promote

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1 *See, e.g.*, SBC Comments at 33-38.

2 47 U.S.C. §160 (a).

3 *See, e.g.*, SBC Comments at 40-42; BellSouth Comments at 60-62. The claim that the "Commission does not yet have sufficient knowledge" to determine whether these three conditions exist (City and County of San Francisco Comments at 8) will not be valid after completion of the record in the present proceeding even if it were valid now.

4 *See, e.g.*, SBC Comments at 42; BellSouth Comments at 62 (citing evidence provided in petition filed by SBC requesting that the FCC forbear from regulating interstate IP-enabled services).

competitive market conditions in the IP-enabled services market but also because it will help revive the still moribund telecom manufacturing industry by increasing investment in telecom infrastructure. Section 706 of the Communications Act authorizes the Commission to consider the impact of regulation on the speed of infrastructure investment by directing the FCC to "encourage the deployment . . . of advanced telecommunications capability [by] remov[ing] barriers to infrastructure investment."[5] The D.C. Circuit likewise has made clear that the Commission has authority to consider the impact of regulation on the speed of investment in telecom infrastructure when deciding whether to regulate.[6] Moreover, the Commission itself has ruled that Section 706 authorizes it to forbear from applying common carrier regulation to telecommunications services in order to promote telecom investment,[7] and FCC Chairman Powell has attached extraordinary importance to the Federal policy of promoting investment in telecom products:

> "We need [telecom] service providers buying switches and other equipment from . . . . [telecom manufacturers] who are even more distressed than the service industry. [These manufacturing] companies are innovators, the R&D arms that have kept . . . [U.S. telecom network[s] at the cutting edge. . . . They must survive for our future."[8]

It is beyond dispute that forbearing from imposing Title II common carrier regulation on IP-enabled services will promote investment in telecom infrastructure.

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[5] Telecomm. Act of 1996, § 706(a) (reprinted at 47 U.S.C. § 157 note).

[6] *U.S. Telecom Ass'n. v FCC, 359 F. 3d 554, 579-80* (holding that it is lawful notwithstanding the resulting injury to ILEC competitors, for the Commission not to apply the UNE unbundling requirement in situations where doing so "would impose excessive impediments to infrastructure investment").

[7] *See Deployment of Wireline Services Offering Advanced Telecom Capability*, Memo Op. and Order and Notice of Prop. Rulemaking, 13 FCC Rec. 24011, 24044-45 at ¶ 69 (1998).

[8] Chairman Michael Powell speech at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002.

First, rapid growth in IP-enabled services will lead to increased investment in broadband network electronics (including DSL, fiber optic, cable TV, WI-FI, and a host of other broadband infrastructures) since IP-enabled services are provided over broadband networks. Growth in the provision of IP-enabled services also will increase investment in a wide variety of specialized consumer products used to access IP-enabled services such as DSL and cable modems, IP routers, and analog-to-digital adaptors. And a growing IP-enabled service industry will increase investment in new advanced service content, such as video and audio programming.[9]

II. The Commission Also Should Preempt PUCs from Applying *State* Telecom Regulation to Any IP-Enabled Service Provided by Any Party

While the Commission may hold that state PUCs have no jurisdiction to impose any state telecom regulation on IP-enabled services on grounds that all IP-enabled services are jurisdictionally interstate as opening comments show[10] and as some PUCs admit,[11] the negative impact that PUC regulation would have on telecom investment helps justify FCC *preemption* of PUC regulation of IP-enabled services even if the Commission were to find that some IP-enabled services constitute jurisdictionally intrastate telecommunications service. Under longstanding precedent, the FCC has

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[9] While the Commission should not impose Title II common carrier regulation on any IP-enabled service, the agency has separate statutory authority (if it desires to exercise that authority) to ensure that companies providing IP-enabled service meet other duties, such as providing 911 service as part of certain IP-enabled service offerings, complying with the Communications Assistance for Law Enforcement Act, compensating other carriers for use of their networks in originating or terminating IP-enabled service transmissions, and contributing to the FCC's universal service fund.

[10] *See, e.g.*, Verizon Comments at 32-33; SBC Comments at 25-38; BellSouth Comments at 26-33; NCTA Comments at 8; CCIA Comments at 22; Microsoft Comments at 14-16; TIA Comments at 7; Alcatel Comments at 9-14; Cisco Comments at 3-6

[11] Maine Pub. Utilities Comm'rs at 5-6 (admitting that IP-enabled services are beyond PUC jurisdiction since they constitute jurisdictionally interstate service).

authority to preempt PUC regulation of intrastate service if the FCC finds that PUC regulation would interfere with the ability of the FCC to achieve a valid Federal objective.[12] The Commission should exercise that preemption authority here because PUC regulation of IP-enabled services would be inconsistent with Federal policies to promote competitive market conditions and to avoid regulating the Internet and advanced services[13] as well as the Federal policy embodied in Section 706 of the Communications Act to promote telecom investment.[14]

There is no merit to the claim by the New York and Virginia PUCs that the Commission may lawfully preempt PUC regulatory authority only if it finds that a specific PUC regulation in a specific state, by itself, frustrates Federal policy.[15] Instead, courts have made clear that it is lawful for the Commission to broadly preempt all attempts by PUCs to regulate the terms and conditions under which any IP-enabled service is provided or to impose entry or exit regulation on companies that provide IP-

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12 *Louisiana v. FCC,* 476 U.S. 355 (1986).

13 *See, e.g.*, Verizon Comments at 37; BellSouth Comments at 33-36; NCTA Comments at 35-37; 39-40; CCIA Comments at 22; Avaya Comments at 10; Motorola Comments at 4; Dialpad *et al.* Comments at 4-5

14 According to news reports, California PUC Comr. Susan Kennedy and Florida PSC Comr. Charles Davidson, speaking on a panel at Supercomm last week, urged the FCC to preempt PUCs from regulating IP-enabled services. *See* Telecom News Ticker at 1, Wed., June 23, 2004. The Vermont PUC makes the unsupported and false contention in its opening comments that "[n]othing [in Section 706] even remotely suggests that the Commission should . . . preempt state regulation of [IP-enabled telecommunications services]." *See* Vermont Public Service Bd. Comments at 33. This bald assertion is patently false since, as indicated above, Section 706 plainly establishes a Federal policy to promote investment in telecom products by instructing the FCC to "remove barriers to infrastructure investment."

15 N.Y. State Dept. of Pub. Service Comments at 9; Virginia Corp. Comm. Comments at 15.

enabled service since regulation of this type inherently interferes with Federal policy objectives (including the Federal policy to promote telecom investment).[16]

The PUCs' opening comments themselves provide the best evidence of the massive amount of disparate and confusing PUC regulation with which an IP-enabled telecommunications service would have to comply if the FCC did not exercise its preemption authority. For example, after listing a number of broad areas that it says it would regulate,[17] the Utah PUC then states ominously that "[t]here [also] are numerous *other [unspecified]* matters that will not be safeguarded in the absence of state regulation."[18] Similarly, the Vermont PUC states that it would adopt, in its own words, "numerous" consumer protection requirements with which IP-enabled service providers would have to comply,[19] and then it lists about two dozen areas it says would be the subject of consumer protection regulation by that PUC.[20]

The comments of the Virginia PUC provide an even more specific example of the massive amount of regulation contemplated by state PUCs. According to the Virginia PUC, Virginia telecom policy requires a company to obtain a license from the Virginia commission to provide intrastate IP-based telephone service in Virginia even if the company markets service *solely* to residents residing in states *other than* Virginia. Virginia law requires licensing in that situation, according to the Virginia PUC, since,

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16 *See, e.g., Calif. v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994)(upholding FCC order broadly preempting PUC efforts (i) to regulate the terms and conditions under which enhanced services are provided and (ii) to impose entry or exit regulation on companies providing enhanced services).

17 Utah Div. of Pub. Utilities Comments at 5-6.

18 *Id.* at 6.

19 Vermont Pub. Service Bd. at 33.

20 *Id.* at 12-19.

due to the inherent portability of IP-based telephone service, a customer of any out-of-state service provider could use his IP-telephone service to make intrastate telephone calls while traveling in Virginia.[21] But if an out-of-state service provider must obtain a license from the *Virginia commission* on the theory that its customers could use the service to make intrastate calls while traveling in Virginia, then that same service provider also could be required to obtain a license from the PUCs in *all 50* states even if it markets service to customers living in only one or two states. The harm to Federal policies (including the policy to promote telecom investment) results from the cumulative effect of being required to comply with this and all other efforts to PUCs to regulate entry into and exit from the IP-enabled services market as well as numerous and conflicting PUC requirements regulating the terms and conditions under which service is provided.

The Minnesota PUC also wrongly contends that Section 253(a) of the Act trumps any authority the FCC might otherwise have to preempt state regulation of any intrastate IP-enabled service (i) since that provision limits the FCC's preemption authority to PUC regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide" service and (ii) since the state regulations at issue here do not have that effect. The Minnesota PUC is wrong on both counts.[22] First, Section 253 does not limit the FCC's preemption authority to PUC regulations that prohibit the provision of service. Instead, Section 253 provides an *additional* justification for preemption beyond the justifications existing in 1996 when Section 253 was added to the Act. In the present

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21 Virginia Corp. Comm. Comments at 14.

22 Minn. Pub. Utilities Comm. Comments at 10.

case, preemption of PUC regulation of intrastate IP-enabled service is justified because it would interfere with the ability of the FCC to achieve valid a Federal objective, a rationale for preemption that the Supreme Court had approved 10 years before Section 253 was added to the Act.[23] The Minnesota PUC's claim that the panoply of conflicting PUC regulations in all 50 states will not have the effect of prohibiting the ability of any entity to provide enhanced IP service is wrong too since numerous parties have explained that state regulation will in fact reduce competition.

CONCLUSION

The FCC should forbear from imposing Title II common carrier regulations on any interstate IP-enabled services, and it also should preempt PUCs from imposing telecom regulations on any intrastate IP-enabled services.

Respectfully submitted,

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[23] *Louisiana v. FCC, supra,* n. 12.

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June 28, 2004

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I certify that a copy of the foregoing "Reply Comments of Ad Hoc Telecom Manufacturer Coalition" was sent today, June 28, 2004, by first class mail to each of the following:

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